88-184 (1)

NO

IN THE
SUPREME COURT OF THE UNITED
STATES TERM October 1988

HORACE DOUGLAS, SR.

PETITIONER,

V.

MAPOTHER AND MAPOTHER, P.S.C.
AND SOUTHEASTERN GREYHOUND
EMPLOYEES CREDIT UNION

RESPONDENTS

PETITION FOR A WRIT OF CERTIORI
ON APPEAL FROM THE COMMONWEALTH OF
KENTUCKY SUPREME COURT

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QUESTIONS PRESENTED

1) In a malpractice action, can the Commonwealth of Kentucky have a higher standard of gross negligence (and/or malicious) when the injury is caused by a lawyer, and a lower standard of negligence when the injury is caused by the general population?

2) Can the Commonwealth of Kentucky Supreme Court consciously fail to follow the law in DUN & BRADSTREET VS. GREENMOSS BUILDERS 86 L ed 2d 593, 472 U.S. 749, 105 S.Ct. 2939 (1985)?

3) Can the Commonwealth of Kentucky have a lower standard of negligence for wrongful attachment, and a higher standard of gross negligence (and/or malicious) for wrongful execution?

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IN THE SUPREME
COURT OF THE UNITED STATED
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ON APPEAL FROM THE COMMONWEALTH
OF KENTUCKY SUPREME COURT

PRAYER

Petitioner Horace Dougals, Sr., requests that a Writ of Certiorari issue to review the judgment and order of the Kentucky Supreme Court.

DECISIONS BELOW

The case was tried in the Jefferson Circuit Court, Division 12, in Louisville, Kentucky, before the Hon. Judge Edwin Schroering, on May 6-8, 1986. The issue of the suit against a lawyer and a credit union concerned their wrongfully issuing an execution and publishing libelous statements of an innocent person. On a jury instruction of malicious, the jury verdict was for the Respondents, and a Judgment was issued 5/21/86.

The Kentucky Court Of Appeals reversed this case, and sent it back for a new trial, by a decision of June 19th, 1987. The Appeals court ruled that lawyers could be sued for negligence, and could be sued for libel. The decision was published in Kentucky Law Summary Vol. 34, No. 8.(and then depublished)

JURISDICTIONAL STATEMENT

The petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1257 (3). The order of the Supreme Court of Kentucky was entered on May 19th, 1988, at 10:00 A.M. This petition will be timely if filed by mail on or before August 18th, 1988 without extension.

The Kentucky Supreme Court decision, stated that an attorney, and a credit union could not be sued for negligence and defamation. This opinion was published in Kentucky Law Summary, Vol.35, No.6, dated 5/20/88, and 750 S.W. 2d 430 (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT.....

..."nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

UNITED STATES CONSTITUTION
FIRST AMENDMENT.....
..."OR ABRIDGING THE FREEDOM OF SPEECH.....

STATEMENT OF THE CASE

In this case, Appellant, HORACE DOUGLAS, SR., and his wife LULA, have owned their residence on Burnett Street in Louisville since 1965. HORACE and LULA'S son HORACE DOUGLAS, JR., also lived at this residence for a period of his adult life. We will refer to the appellant as Senior and his son as Junior, as we review the facts, for the sake of simplicity.

Junior was a bus driver for Greyhound, when in April, 1978 he had a fellow employee co-signed for a note on a car loan with Greyhound Credit Union. Two months later Junior signed for a personal loan with the same credit loan. Respondent law firm of Mapother and Mapother, P.S.C., represented the credit union in its lawsuit against

Junior for the balance of the personal loan, and obtained a default judgment. Junior satisfied the judgment after his wages were garnished. The Respondent's law firm again represented Greyhound Credit Union in its second lawsuit against Junior to recover for the co-signed note. Summary Judgment in favor of the credit union was issued, and then the law firm and credit union issued an execution against the Burnett Street property of "HORACE DOUGLAS." Junior filed for bankruptcy, of which Respondent received notice, but it failed to remove the lien on the Burnett Street property. Meanwhile, Senior had been making overtures towards establishing a small automobile brake repair shop. Senior then went to his bank and applied for a $10,000.00 loan, pledging his Burnett Street property

as collateral. The bank's routine check of the collateral found an outstanding judgment and a lis pendens on the home; which had been filed with the county clerk and had been published in the newspaper, as well as a credit bureau negative report. Thus the loan application was forced into limbo, while Senior took steps to correct the mistake. His counsel succeeded in having the Respondent law firm release the lien, by a mere letter. However, it was not until after Senior filed his lawsuit that the law firm informed the bank of its error, and notified the credit bureau that the outstanding judgment was against Junior, not Senior. These remedial measures consumed some five months. Petitioner filed suit, in the Jefferson Circuit Court, in Louisville, Kentucky against the Respondents, alleging

causes of action for wrongful execution, negligence, defamation, outrage, and slander of title.

The trial court disposed of all the causes of action by directed verdict, with the exception of the claim of wrongful execution, which went to trial on a jury instruction of malicious, and which resulted in a jury verdict for the Respondents. The Kentucky Court Of Appeals reversed and remanded the case to the lower court to reconsider, and to retry the question of negligence and defamation on behalf of the parties. The Kentucky Supreme Court reversed the Court Of Appeals, and upheld the Trial Court.

The Petitioner had raised Federal issues in his briefs, and arguments in the Trial Court, Court of Appeals, and Kentucky Supreme Court.

The Petitioner claims that lawyers are not a separate class of people who get special protection from the courts.

ARGUMENT FOR GRANTING WRIT

The Kentucky Court Of Appeals made a proper Appellant decision in this case, and the Kentucky Supreme Court wrongfully reversed, concerning the question of suing a lawyer for negligence, and defamation when he and his client, wrongfully issued an execution, and published defamatory statements concerning an innocent party. This case involves a basic Anglo American right, to allow an injured person to have his day in Court, for libel and negligence. The Petitioner's Legal counts, in his complaint, were dismissed, by the Circuit Court, over objections, down to a jury instruction requiring the jury to find that the wrongful execution was maliciously done, before it could return a verdict.

The Petitioner is HORACE DOUGLAS, SR.,

(born just HORACE DOUGLAS) who is a retired (Louisville) mailman (a 26 year veteran); married; owns his own home; who at age 62, is of good moral character; is a good citizens, and had an unblemished credit history. The Petitioner had a number of children and one of them was named HORACE DOUGLAS, JR., (Junior). He was a former Greyhound bus driver and now drives for The Transit Authority River City, in Louisville. The Respondent, Mapother and Mapother is a professional service corporation, specializing in collections. The law firm has specialized in collections for over 50 years. This corporation has 65 employees with a Louisville and a Lexington Kentucky Office, as well as offices in Indiana, Ohio, West Virginia and Tennessee; thus making them the

largest collection firm in the area. Mapother himself is the author of the only collection handbook for Kentucky lawyers, and is a frequent lecturer on collection topics.

The Respondent Southeastern Greyhound Employees Credit Union is the credit union arm of the Greyhound bus system, and was a client of Mapother.

The Court Of Appeals cited a case of MCCALL VS. COURIER JOURNAL, AND LOUISVILLE TIMES 623 SW 2d 886, (1981) cert denied 102 S. CT 2239, 456 US 975, 72 L ed 849 (1982).

Tim McCall was a local attorney who sued, the only local newspaper, successfully for libel. The Kentucky Supreme Court said (by implication), in the Douglas case, that this does not work in reverse, that is, that a lawyer can not be

sued for libel. Further it refused to apply DUN & BRADSTREET VS GREENMOSS BUILDERS 86 L ed 2d 593, 472 US 749, 105 S. CT 2937 (1985), prior cite 461 A 2d 414 (1983). By its decision, the Kentucky Supreme Court has set up two standards, a higher one for lawyers, and a lower one for everyone else.

In Kentucky, the Courts have said that if a doctor operates on the wrong patient, he certainly is liable in negligence, SOUTHEASTERN KENTUCKY BAPTIST HOSPITAL VS. BRUCE, Ky. 539 SW 2d 286 (1976). If a person or corporation issues false and libelous statements wrongfully, they are subject to damage awards, see PEARCE VS. COURIER JOURNAL, Ky. App. 683 SW 2d 633 (1985). If a hotel manager calls an employee a

robber, it is liable "per se", see COLUMBIA SUSSEX CORP., VS. HAYS Ky. 627 SW 2d 270 (1980). If a veterinarian posts a "deed beat" list in his window, the Kentucky Courts have said that he is accountable in liable, see BRENTS VS. MORGAN Ky., 299 SW 2d 967 (1927). The idea that lawyers are only accountable to their clients and are somehow different from other trades and professions should have ended with GOLDFARB VS. VIRGINIA STATE BAR 421 US 773, 44 L ed 2d 572, 95 S. Ct 2004 (1975) and BATES VS. STATE BAR OF ARIZONA 433 US 350, 53 L ed 2d 810, 97 S. Ct 2691 (1977).

The United States Supreme Court case of BYERS VS. SURGET 60 US 303, 15 L ED 670 (1856), which was a case against a lawyer who wrongfully executed and sold land, allowed a suit against a non

employed lawyer and said, p. 672:

"To the Appellant must necessarily be imputed full knowledge of this transaction; he was the attorney for the defendant in the State Court, he is shown to have been not only the advisor, but virtually the executor of every step taken for the enforcement of the judgment of that court; and, as a comprehended the nature and effects of the measures adopted by him at his instance. The bill impeaches these measures as being contrived by the appellant for purposes of fraud and oppression, as is betrayed."

The Kentucky Supreme Court cited in its decision, Restatement of Torts, Second, Section 674-676. This Section (674) states (in the comments, Section D) that an attorney who takes wrongful steps in legal proceedings is not liable, when it said:

"Even if he has no probable cause, and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtain in a proper adjudication of his claim....."

The Mapother case was a continuation by the Kentucky Supreme Court of the

necessity to use malicious standard against a lawyer, see a malpractice case of RAINE VS DRASIN Ky. 621 SW 2d 895 (1981), and HILL VS. WILLMOTT, Ky. App. 561 SW 2d 331 (1978), and fully discussed by Professor Johnstone, in 70 K.L.J. 747, concluding for petitioner. It was further pointed out to the Kentucky Supreme Court that the Kentucky Court of Appeals had also set the standard of negligence against a lawyer in a CR 11 action, see LOUISVILLE RENT-A-SPACE VS. AKAI, Ky. App. 746 SW 2d 85 (1987). This case was not appealed to the Kentucky Supreme Court. So what the Kentucky Supreme Court has done, is have two standards, one a higher standard threshold, for suits against lawyers, and one, a lower threshold for suits against the remaining 99% of the population. The

Kentucky Courts, should not protect lawyers, see SHAPERO VS. KENTUCKY BAR ASSOCIATION 56 U.S.L.W. 48 (1988).

The Appellant proposed a constitutional problem, to the courts with the difference between a wrongful execution suit and a wrongful attachment suit. A wrongful attachment suit is governed by K.R.S. 411.080 (an 1852 statute) which states that no proof of malice is needed. A wrongful execution suit is not governed by any statute. Attachment and execution do the 100% exact same thing but, one is Pre Judgment and one is Post Judgment. So if the Mapother Law Firm had made the same mistake Pre Judgment, the jury instruction, would have been without malice, for general damages. The Petitioner was required to amend his pleadings to wrongful execution by the Trial Judge, from one using non malice.

Lawyers should not be protected, see **CHASTAIN VS SUNQUIST** 833 F 2d 311 (D.C. Cir. 1987).

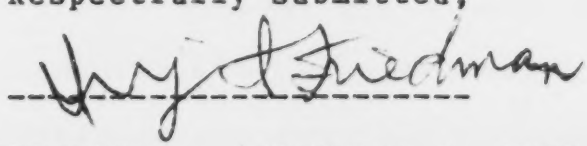
The Appellant claims that there cannot be a greater standard for one (execution) against, the other (attachment), see SNIADACH VS. FAMILY FINANCE 23 L. ed 2d 882, 395 US 693, 89 S Ct. 182 (1969). Clearly, the Kentucky Court of Appeals had the right facts and followed the right law and the Discretionary Appeal to the Kentucky Supreme Court should not have changed this, for the protection of lawyers, see Court decision attached.

CONCLUSION

For the totality of the reasons set forth above, the petitioner requests that this Court issue a writ of certiorari to the Kentucky Supreme Court.

The Kentucky Court Of Appeals, said in reversing the Trial Court, that a lawyer and a Credit Union were accountable, in liable, and negligence for wrongful credit statements and have execution concerning an innocent party. The Petitioner asks that this be upheld as National Law.

Respectfully submitted,



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APPENDIX

A. A decision of the Jefferson Circuit Court of 5/21/86, Court with the Jury Instructions of 5/8/86.

B. A decision of the Kentucky Court of Appeals of 6/11/87.

C. A decision of the Kentucky Supreme Court of 5/20/88.

APPENDIX A

HORACE DOUGLAS, SR. PLAINTIFF,

V.

MAPOTHER AND MAPOTHER, PSC, et al DEFENDANT,

NO. 84-CI-05057

JEFFERSON CIRCUIT COURT
DIVISION #12

COURT'S JURY INSTRUCTIONS
MAY 8TH, 1986

EDWIN A. SCHROERING, JR., JUDGE

THE JURY IS INSTRUCTED AS FOLLOWS:

INSTRUCTION NO. 1

It is admitted by the defendants Mapother and Mapother, PSC, and Southeastern Greyhound Credit Union, Inc., (all referred to herein as Mapother) that they did issue an execution against Horace Douglas, Sr. (hereinafter referred to as Douglas), when in fact they had only a judgment against Douglas' son by the same name. If you, the jury, shall believe from the

evidence that Mapother, maliciously and without probable cause, procured the execution on Douglas', property, the law is for Douglas and the jury will so find. Unless the jury should so find, then the law is for Mapother.

The term "maliciously" and "malice" as used in this Instruction means the intentional doing of a wrongful act to the injury of Douglas.

INSTRUCTION NO. 2

If the jury believed from the evidence there was no probable cause shown for the issuance of the execution against the Douglas property, they may, in their discretion, infer malice.

If the jury shall believe from the evidence that Mapother, from all of the evidence before them, had reasonable grounds to believe that Douglas was the

person indebted to them and that such evidence before them was such as would have induced a person of reasonable prudence to reach the same conclusions, then the defendant and probable cause for the issuance of an execution against the property of Douglas.

"Probable cause" as used in these Instructions means the existence of such facts and circumstances as would induce a man of ordinary prudence to believe that Douglas was the person indebted to him and that he had reasonable grounds for the issuance of the execution against the real estate.

INSTRUCTION NO. 3

If the jury finds for Douglas, they may award him such a sum in damages as they may believe from the evidence will fairly and reasonably compensate him for any mortification or humiliation, if any

there was, caused by the execution on his property and for any damages done his reputation or character; or for loss of use of his property during the time that the execution remained outstanding against the property, which was caused or brought about directly by the malicious acts of the defendants; and for any reasonable sum which he was forced to pay his attorney for representing him in causing the release of the execution, said sum not to exceed 120.00, you whold award in the discredtion of the jury.

INSTRUCTION NO. 4

If you have found for the Plaintiff, under the above Instruction, and it you further believe from the evidence that the wrongful execution herein was willful, malicious, and without justification, you may in your

discretion award the plaintiff punitive damages. Punitive damages are awarded in order to punish a defendant for his conduct.

If you find for the plaintiff under this Instruction, you should find and determine your damages separately on the Verdict Form attached to these Instructions.

"Malicious" as used in this Instruction means a wanton or reckless disregard for the plaintiff's rights in the property.

INSTRUCTION NO. 5

It was the duty of the plaintiff to avoid or minimize loss or damage to himself or his property as a reasonably prudent person under similar circumstances would have done, you may take that into consideration in awarding or reducing damages.

INSTRUCTION NO. 6

Nine or more of you may reach a verdict in this case. If all of you agree on the verdict, only your Foreperson, whom you yourselves choose, need sign the verdict. If less than twelve of you agree upon the verdict, then all of those who agree must sign.

EDWIN A. SCHROERING, JR., JUDGE

DATE: MAY 8, 1986

ENTERED IN COURT

VERDICT FORM "A"

We, the jury, find for the defendants, Mapother and Mapother, PSC and Southeastern Greyhound Credit Union, and award the plaintiff nothing for his claim.

FOREPERSON	

APPENDIX "B"

We, the jury, find for the Plaintiff on his claim against Mapother and Mapother, PSC and Southeastern Greyhound Credit Union and award him damages as follows:

(a) For mortification and humiliation suffered; $_____

(b) For damages to his reputation and character; $_____

(c) For loss of use of his real estate during the period of time that the execution remained outstanding against his property; $_____

(d) Attorney's fees expended to release execution; $_____

$_____

NOT TO EXCEED $120.00

TOTAL (In Jury's Discretion

$_____

_____ _____

FOREPERSON

_____ _____

VERDICT FORM "C"

We, the jury, find for the plaintiff, Douglas, and award him punitive damages in the sum of $_____
In Jury's Discretion

_____ _____
FOREPERSON

_____ _____

_____ _____

_____ _____

TRIAL ORDER
MAY 9TH, 1986

JEFFERSON CIRCUIT COURT
DIVISION #12

HORACE DOUGLAS, SR.
PLAINTIFF

NO. 86-CI-05057 VS.

MAPOTHER AND MAPOTHER, PSC et al
DEFENDANT

This case came on for a jury trial on May 6th, 1986. The plaintiff was represented by the Honorable Franklin S. Yudkin and the defendants were represented by the Honorable Philip C. Chance and the Honorable John Morgan. Both sides announced ready and the jury was selected and sworn.

The parties each then made their opening statements and the plaintiff presented his proof throughout the day, but the hour growing late, at 5:15 P.M. on May

6th, 1986, the jury was admonished and the Court recessed overnight.

The Court reconvened at 9:45 A.M. on May 7th, 1986, and the plaintiff continued presenting his proof throughout the day, but the hour growing late, the jury was admonished and the Court recessed at 5:45 P.M.

The Court reconvened at 9:30 A.M. on May 8th, 1986, and shortly thereafter, the plaintiff announced that he had closed his case.

After a recess, the defendant then presented his proof and announced at 3:45 P.M., that he had closed his case.

The Court then instructed the jury and the parties made their final arguments, after which juror, Bonnie L. Oliver, was selected by lot and excused as juror 13.

The jury then went into deliberations

and at 5:45 P.M. entered the courtroom and announced their verdict in words and figures as follows:

"VERDICT FORM "A"

We, the jury, find for the defendants, Mapother and Mapother, PSC and Southeastern Greyhound Credit Union, and award the plaintiff nothing on his claim."

/s/ Walter F. Hiller, Foreperson

The plaintiff moved this Court and the jury was then polled, it being an unanimous verdict.

The jury was thanked and discharged at 5:50 P.M.

EDWIN A. SCHROERING, JR., JUDGE

DATE: MAY 9TH, 1986

HORACE DOUGLAS, SR.
PLAINTIFF,

VS.

MAPOTHER AND MAPOTHER, PSC
AND SOUTHEASTERN GREYHOUND
EMPLOYEES CREDIT UNION
DEFENDANTS,

JUDGMENT

This case having come on for trial on the 6th day of May, 1986, a jury having been duly empaneled, proof having been taken, motions having been made and sustained at the close of plaintiff's proof to dismiss Counts II, III, and IV of the Complaint, the jury having been instructed on the law by the Court and having returned a verdict for the Defendants, awarding the plaintiff nothing on his claim;

IT IS HEREBY ORDERED AND ADJUDGED that judgment is hereby entered in favor of defendants, Mapother and Mapother, PSC

and Southeastern Greyhound Employees Credit Union, awarding plaintiff nothing on his claim herein;

IT IS FURTHER ORDERED AND ADJUDGED that the Complaint of the plaintiff is hereby dismissed, with prejudice, and costs are awarded to the defendants.

_____
JUDGE

_____
DATE

ENTERED: MAY 21ST, 1986

THIS JUDGMENT TENDERED:

MAPOTHER AND MAPOTHER, ATTORNEYS
PHILIP C. CHANCE

COUNSEL FOR DEFENDANTS
801 W. JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 509-7680

HORACE DOUGLAS, SR.
PLAINTIFF,

VS.

MAPOTHER AND MAPOTHER, PSC
DEFENDANTS

NO. 84-CI-05057

NOTICE-MOTION-ORDER

Notice is given that the Plaintiff will make the following Motion on June 2nd, 1986, at 2:00.

MOTION

Comes the Plaintiff, by counsel and moves this court for a new trial CR. 59 (E, F, and H subparts) as the verdict was not sustained by the evidence. The Plaintiff claims error in having submitted to a jury only one count of his complaint and that, that particular count required a showing of malice prior to the jury returning a verdict.

A. The Plaintiff states that the Defamation Count would have been a

"Per Se" or "Per Quod" defamation and would not have required malice, see below:

1) Elements

   A. Making a defamatory statement and publishing.

   B. Per se and per quod.

   C. Prior good character of Plaintiff.

Anno. An jur pleading and practice forms.

2) Cases the Plaintiff relies on DUN & BRADSTREET VS. GREENMOSS BUILDERS 86 L ed 2 D 593 (1985).

   MCCALL VS. THE COURIER JOURNAL, Ky. 623 SW 2d 882 (1981).

   COLUMBIA SUSSELL CORP. VS. HAYS Ky. 627 SW 2d 270 (1980).

3) Proof meeting elements and law

   A) General damages are humiliation mental anguish, etc.

   B) Special damages-supporting economic loss.

4) Other defamation is in Restatement of Torts 2nd, Section 559.

B) The Plaintiff states that in a Negligence Count we also would not have to prove malice, see below:

1) Elements

A) Violation Duty

B) Actual cause vs substancial faction.

2) Cases

Negligence per se BLUEGRASS RESTAURANT COMPANY vs. FRANKLIN 424 SW 2D 594 (1908)

FITE VS. LEE 54 P 2D 964, 97 AUR 3D 678 (Wash 1974) concerning a lawyer issuing a wrongful garnishment.

DAUGHERTY VS. RUNNER Ky. App. 581 SW 2D 12 (1978).

RAINE VS. DRASIN Ky. 621 SW 2D 895 (1981).

C) In the Wrongful Execution Court the Plaintiff states that this court should have applied KRS 411.808 and not required the Plaintiff to prove malice. This party states that although 411.080 states the word "attachment" this count should have applied it to executions, as was stated by this count during the directed verdict argument.

The Plaintiff states that "Malice" was too high a standard to put the Plaintiff through, and this count should give a new trial.

D) The Plaintiff also states that the Plaintiff's evidence on loss of profits from his new business should have been allowed to be presented to the jury, see below:

PAVLINE'S CHICKEN VILLA, INC. VS. KFC

Ky. App. 701 SW 2d 399 (1986).

This stopped the jury from hearing all of the Plaintiff's case.

E) Further, the Plaintiff asks for a JUDGMENT NOT WITHSTANDING THE JURY VERDICT (J.N.O.V.) as the Plaintiff proved his case and should have a verdict against the defendants.

WHEREFORE, the Plaintiff asks for a new trial or a J.N.O.V.

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ENTERED: JUNE 8, 1986

CERTIFICATION

I HEREBY CERTIFY THAT A COPY OF FOREGOING WAS MAILED TO PHILIP C. CHANCE, COUNSEL FOR DEFENDANTS 801 W. JEFFERSON STREET, LOUISVILLE, KENTUCKY 40202, ON MAY 28, 1986.

FRANKLIN S. YUDKIN

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

HORACE DOUGLAS, SR.
PLAINTIFF,

V.

MAPOTHER AND MAPOTHER, P.S.C.
AND SOUTHEASTERN GREYHOUND
EMPLOYEES CREDIT UNION
DEFENDANTS

NO. 84-CI-05057

JEFFERSON DISTRICT COURT
DIVISION #12

APPEAL FROM JEFFERSON CIRCUIT COURT HONORABLE EDWIN A. SCHROERING, JR. JUDGE

AFFIRMING IN PART- VACATING AND REMANDING IN PART

BEFORE: COMBS, COOPER AND HAYES, JUDGES.

COMBS, JUDGE: This is an appeal from the verdict of a jury in Jefferson Circuit Court which found against the appellant's claim for wrongful execution. The trial court earlier had dismissed other counts within appellant's complaint.

This litigation is a severely unfortunate example of the common confusion that arises out of a father and son having the same name; in this case Horace Douglas. Appellant, Horace Douglas, Sr., and his wife Lula, have owned their residence on Burnett Street in Louisville since 1965. Horace and Lula's son, Horace Douglas, Jr., also lived at this residence for a period of his adult life. We will refer to the appellant as Senior and his son as Junior as we review the facts, for the sake of simplicity.

Junior was a bus driver for Greyhound, when in April, 1978 he had a fellow employee co-signed for a note on a car loan with Greyhound Credit Union. Two months later Junior signed for a personal loan with the same credit union. Appellee law firm represented the credit

union in its lawsuit against Junior for the balance of the personal loan, and obtained a default judgment. Junior satisfied the judgment after his wages were garnished. The appellee law firm again represented Greyhound Credit Union in its second lawsuit against Junior to recover for the co-signed note. Summary Judgment in favor of the credit union resulted. Once again a garnishment of Junior's wages issued. Appellee law firm also caused an execution to be issued against the Burnett Street property of "Horace Douglas." Junior filed for bankruptcy of which appellee received notice, but failed to remove the lien on the Burnett Street property.

Meanwhile, Senior had been making overtures towards establishing a small automobile brake repair shop. He

had looked at a particular piece of real estate and obtained a real estate agent's written opinion of the location and its suitability for Senior's intended purpose. Senior then went to his bank and applied for a $10,000.00 loan, pledging his Burnett Street property as collateral. The bank's routine check of the collateral found an outstanding judgment and a lis pendens on the home. Thus the loan application was forced into limbo while Senior took steps to correct the mistake. His counsel succeeded in having the appellee law firm release the lien by a mere letter. However, it was not until after Senior filed his lawsuit that the law firm informed the bank of its error, and verified to the credit bureau that the outstanding judgment was against Junior, not

Senior. These remedial measures consumed some five months. Then the bank contacted Senior to ask him if he was still interested in the loan. Senior's response was that he no longer could use the money because the location for his considered business was no longer available. There are three major issues now on appeal. First, appellant contends that the trial court erred when it dismissed most of the counts in his complaint, leaving him to prosecute only the count for wrongful execution. Second, appellant perceives error by the trial court in denying him the opportunity to introduce evidence of economic loss resulting from appellee's execution. Finally, appellant believes the court's instruction to the jury was erroneous. We begin with consideration of the trial

court's dismissal of numerous counts within appellant's complaint. The first of these is his stated cause of action for outrage. Outrage was recently recognized as a tort by the Kentucky Supreme Court in CRAFT VS RICE, Ky., 671 S.W. 2d 247 (1984). That decision adopted as its definition of outrage that of RESTATEMENT (SECOND) OF TORTS 46 which is:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

671 S.W. 2d 251.

We find absolutely nothing in the record demonstrating conduct on the part of the appellee that rises to the level of

extreme and outrageous. The execution was pursued to enforce a promissory note signed by "Horace Douglas", whose address was 2528 W. Burnett Street. The property executed upon was discovered by appellee to be owned by Horace and Lula Douglas, and as having an address of 2528 W. Burnett Street. This conduct seems more routine than extreme or outrageous. As such, we do not continue for the purpose of considering the tort of outrage whether appellee's actions were reckless and caused severe emotional distress. The trial court correctly dismissed the count of outrage.

The trial court dismissed appellant's count for defamation of credit believing "that the filing of an execution which on its face makes a true statement does

not come within the perimeters of defamation." The notice of execution which was filed and published, and which is the subject of appellant's defamation complaint, does indeed contain only true statements. It begins with the style of the Jefferson District Court lawsuit that was brought against Junior, and continues to levy against whatever right, title, and interest the defendant may have in the Burnett Street property owned by Horace and Lula Douglas. The only implication of appellant on the document is within the property description. We agree with the trial court that the statements were true, thus not defamatory.

We now consider the trial court's dismissal of appellant's negligence count against both appellees. Appellees argue the dismissal was proper citing as

authority the cases of RAINE VS. DRASIN Ky., 621 S.W. 2d 331 (1978). Both of those cases dealt with physicians who had been sued for medical malpractice. They successfully defended, and then brought suit against the attorneys who had represented the plaintiffs. HILL held that the physician had no cause of action against the attorney for negligence, but only for malicious prosecution. The physicians in RAINE sued the attorneys for malicious prosecution and abuse of process. These cases are not germane to appellant's situation because he was never prosecuted by appellees, maliciously or otherwise. Thus, not only was a malicious prosecution standard an inappropriate gauge of the merits of his negligence count, appellant had no cause of action for malicious

prosecution at all as an essential element of that action is the plaintiff's successful defense in the prior action. A review of the trial transcript reveals that the court's considerable attention to the motion to dismiss the negligence count was guided by malicious prosecution standards. The facts of this case show that the appellees had a hand all the information necessary to discern the difference between appellant and Junior. They knew Junior owned no real property, and that "Horace Douglas" obtained title to the Burnett Street property in 1965, and that Junior at the time was seventeen years old. Recognition of the foregoing facts alone would have avoided the mistaken identity and resultant inconveniences to appellant. We think the trial court

should have evaluated the negligence count using the guidelines of MCCALL VS. COURIER-JOURNAL & LOUISVILLE TIMES Ky., 623 S.W. 2d 882, 1981, cert.denied 102, S. Ct. 2239, 456 U.S. 975, 72 L ed 2d 849 (1982), and decided whether appellant had enough evidence that appellees had negligently placed him before the public in a false light to have warranted sending the question for the jury.

The sole count within appellant's complaint which went to the jury was for wrongful execution. Appellant argues on appeal that the trial court improperly instructed the jury on this count. We cannot consider this issue because it was not preserved for appellee review pursuant to CR 51 (3) which states:

"No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds for his objections."

Finally, we reach appellant's issue of whether the trial court erred by excluding evidence of loss of proffered evidence of lost profits throughout the record, and conclude as did the trial court that it is wholly of too speculative a nature to be put before a jury. The rule in Kentucky for determining whether evidence of lost profits is admissible is whether the same may be established with reasonable certainty. PAULINE'S CHICKEN VILLA, INC. vs. K.F.C. CORP., Ky., 701 S.W. 2d 399 (1985). Where the alleged lost profits are of an unestablished business, the

proof will be more difficult than where the business has a history. We do not think appellant overcame this difficulty by removing the evidence from the area of mere speculation. Moreover, because the only piece of property which held appellant's interest was never for sale during the time relevant to the question we believe the trial court's ruling was correct.

For the foregoing reasons the judgment of the Jefferson Circuit Court dismissing appellant's complaint for negligence is vacated and that count remanded to the court for further consideration consistent with this opinion. The remainder of the trial court's judgment is hereby affirmed.

ALL CONCUR.

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APPENDIX "C"

MAPOTHER AND MAPOTHER, P.S.C.
AND SOUTHEASTERN GREYHOUND
EMPLOYEES CREDIT UNION
MOVANTS
SUPREME COURT OF KENTUCKY
VS.

HORACE DOUGLAS, SR.
RESPONDENT

CASE NO. 87-SC-646-DG
SUPREME COURT OF KENTUCKY

ON REVIEW FROM THE COURT OF APPEALS
NO. 86-CA-1463-MR
JEFFERSON CIRCUIT COURT
NO. 84-CI-05057

OPINION OF THE COURT BY
JUSTICE GANT

AFFIRMING IN PART, REVERSING IN PART

This action grew out of a promissory note executed to Southeastern Greyhound Employees Credit Union, which note was co-signed by "Horace Douglas". However, the note was actually executed by Horace Douglas, Jr., who lived with his parents, Horace J. Douglas Sr., and Lula B.

Douglas, at 2528 Burnett Street in Louisville. After judgment was obtained on the note, it was found that title to the Burnett Street property was held in the name of Horace J. Douglas and Lula B. Douglas (the parents), the word "Sr." not appearing in the deed anywhere. It is not disputed that the debtor did not use the word "Jr." or Junior in executing the note, nor was title to the Burnett Street property taken in the name of Horace J. Douglas, Sr., Movants Mapother and Mapother, attorneys for the Credit Union, levied execution upon the "right, title and interest of the defendant, Horace Douglas, a/k/a Horace J. Douglas" in said property. Two days after the execution was levied, Sr. applied for a loan for a purpose of opening an automobile brake shop at a

specific location and was informed a few days later that the execution had been levied against the property which he intended to use a collateral. Once the movants, Mapother and Mapother, were informed of the mistake the lien was removed. The bank then informed respondent that his loan application was approved, but he rejected the loan because of his belief that the property no longer for sale. As a matter of fact, the owner of the property testified that it had never been for sale.

Respondent then filed suit against the movants, alleging causes of action for wrongful execution, negligence, defamation of credit, outrage, and slander of title. The trial court disposed of all the causes of action by directed verdict or order with the exception of the claim of wrongful

execution, which went to trial and resulted in a jury verdict for the movants. The Court of Appeals reversed and remanded the case to the lower court to reconsider the question of negligence on behalf of the parties.

We encounter two types of action in malpractice suits against an attorney. One is an action involving in former client or clients of the attorney, which action entails the same elements as every negligence--viz., duty, breach of duty, causal connection between the conduct and the resulting injury, and actual loss or damage. SEE Prosser and Keeton, The Law of Torts, 163, 168 (5th ed. 1984).

This court and the Court of Appeals have held that the ordinary elements of negligence do not apply in cases

involving suits by opposing litigants or non-parties against the attorney in that suit. ROSE VS. DAVIS, 288 Ky. 674, 157 S.W. 2d (1941); HILL VS. WILLMOTT, Ky. App., 561 S.W. 2d 895 (1981). Instead, in this type of action, the law is set out in Restatement (Second) of Torts, 674-76 (1977). These sections are found under the general heading of Chapter 30, entitled "Wrongful Use of Civil Proceedings." We would note in passing that this is a more accurate categorization that "malicious prosecution" as utilized in HILL VS. WILMOTT, supra, and any reliance upon the dicta in that case where a civil action is involved is misplaced. Those sections referred to in the Restatement read as follows:

674. General Principle

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for the purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

674. Existence of Probable Cause

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is

based, and either

(a) correctly or reasonably believes that under these facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

676. Propriety of Purpose

To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

In this case, the issue submitted to the jury was that of "wrongful execution," which, of course, corresponds to the Restatement category of "Wrongful Use of Civil Process." The movants herein complain about the instructions herein which utilized the word "malice" as being a necessary element before judgment could be rendered against the movants herein. However, any error concerning these instructions was not preserved, as respondent did not in any way object to the instructions about the use of the malice requisite. See CR 51 (3). The use of "Malice" probably emanated

from dicta in HILL VS. WILMOTT, supra which referred to "malicious prosecution" rather that "wrongful use of civil process."

In the instant case, the correct legal issue was submitted to the jury which rendered a verdict in favor of the movants--both the Credit Union and the law firm.

We affirm the Court of Appeals on those parts to the opinion which affirmed the Jefferson Circuit Court, but reverse that portion which was remanded for examination of the negligence aspect of the case.

The judgment of the Jefferson Circuit Court is affirmed in all respects.

ALL CONCUR.

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MAPOTHER AND MAPOTHER, P.S.C.
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EMPLOYEES CREDIT UNION
MOVANTS

VS.

HORACE DOUGLAS, SR.
RESPONDENT

SUPREME COURT OF KENTUCKY

NO. 87-SC-646-DG
ON REVIEW FROM COURT OF APPEALS
NO. 86-CA-1463-MR

ORDER CORRECTING OPINION

On the Court's own motion, on page 4 of the Opinion of the Court by Justice Gant herein, rendered May 19, 1988, on the third and fourth lines of the first full literary paragraph after the quote, the phrase "The Movants herein complain" is deleted, and the phrase "The Respondents complain" is substituted in lieu thereof.

ENTERED MAY 20TH, 1988

_____
CHIEF JUSTICE

MAPOTHER AND MAPOTHER, P.S.C.
AND SOUTHEASTERN GREYHOUND
EMPLOYEES CREDIT UNION
MOVANTS

VS.

HORACE DOUGLAS, SR.
RESPONDENT

ON REVIEW FROM COURT OF APPEALS
NO. 86-CA-1463-MR
JEFFERSON CIRCUIT COURT
NO. 84-CI-05057

SUPREME COURT OF KENTUCKY

ORDER CORRECTING OPINION

On the Court's own motion, on page 4 of the Opinion of the Court by Justice Gant herein, rendered May 19, 1988, beginning on the third line of the first full literary paragraph after the quote, the following sentence is deleted; "The Movants herein complain about the instructions herein which utilized the word "malice" as being a necessary element before judgment could be rendered against the movants

herein." The following sentence is substituted in lieu thereof: "The respondent complains about the instructions which utilized the word "malice" as being a necessary element before judgment could be rendered against the movants."

ENTERED MAY 23RD, 1988

CHIEF JUSTICE